Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LARRY CHANDLER and JOANNE CHANDLER,

Petitioners,

v.

NORWEST BANK MINNESOTA, NATIONAL ASSOCIATION, and CUSTOM MORTGAGE, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Eighth Circuit's imposition of sanctions pursuant to Fed.R.Civ.P. 11 conflict with the well-settled principle that Rule 11 is not intended to chill novel legal or factual theories where petitioners presented a legal theory and supporting evidence that one Circuit Judge found to be both legally correct and factually adequate?
2. Did the Eighth Circuit's opinion eviscerate the Real Estate Settlement Procedures Act, 12 U.S.C. §2601 *et seq.* ("RESPA"), by creating a loophole through which mortgage brokers and lenders can effectively "table fund" loans without being subject to RESPA's requirements, thereby contravening Congress' language and intent?
3. Did the Eighth Circuit silently rewrite RESPA to include a trustee exception, thereby contravening Congress' language and intent?

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PREVIOUS OPINIONS

The citations of the official and unofficial reporters of the opinions and orders entered in this case, in reverse chronological order, are as follows:

The United States Court of Appeals for the Eighth Circuit denied petitioners' petition for rehearing *en banc*: *Chandler v. Norwest Bank Minn., N.A.*, unreported. App. 15.

The United States Court of Appeals for the Eighth Circuit affirmed the decision of the United States District Court for the Eastern District of Missouri: *Chandler v. Norwest Bank Minn., N.A.*, 137 F.3d 1053 (8th Cir. 1998). App. 1.

The United States District Court for the Eastern District of Missouri granted defendants' motions for summary judgment, granted Norwest's motion for sanctions, and denied all remaining motions as moot. Unreported. App. 24.

STATEMENT OF JURISDICTION

The Eighth Circuit affirmed the decision of the District Court for the Eastern District of Missouri granting summary judgment in favor of defendants on March 24, 1997. App. 1. The petitioners timely filed a petition for rehearing *en banc* on March 17, 1998, which was denied on April 24, 1998. App. 15. The petitioners now timely seek a writ of certiorari. This Court has jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Real Estate Settlement Procedures Act, 12 U.S.C. §2601 *et seq.*

12 U.S.C. §2602. Definitions:

For purposes of this Act—

. . .

(5) the term "person" includes individuals, corporations, associations, partnerships, and trusts;

. . .

12 U.S.C. §2607. Prohibition against kickbacks and unearned fees:

(a) Business referrals. No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges. No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

. . .

Regulation X, 24 C.F.R. §3500

24 C.F.R. § 3500.2. Definitions:

. . .

(b) Other terms. As used in this part:

. . .

Table funding means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds. A table-funded transaction is not a secondary market transaction (see §3500.5(b)(7)).

24 C.F.R. § 3500.5. Coverage of RESPA.

(a) Applicability. RESPA and this part apply to all federally related mortgage loans, except for the exemptions provided in paragraph (b) of this section.

(b) Exemptions.

. . .

(7) Secondary market transactions. A bona fide transfer of a loan obligation in the secondary market is not covered by RESPA and this part, except as set forth in section 6 of RESPA (12 U.S.C. 2605) and § 3500.21. In determining what constitutes a bona fide transfer, HUD will consider the real source of funding and the real interest of the funding lender. Mortgage broker transactions that are table-funded are not secondary market transactions. Neither the creation of a dealer loan or dealer consumer credit contract, nor the first assignment of such loan or contract to a lender, is a secondary market transaction (see §3500.2.)

24 C.F.R. §3500.14. Prohibition against kickbacks and unearned fees:

(a) Section 8 violation. Any violation of this section is a violation of section 8 of RESPA (12

U.S.C. 2607) and is subject to enforcement as such under § 3500.19.

(b) No referral fees. No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person. Any referral of a settlement service is not a compensable service, except as set forth in § 3500.14(g)(1). A company may not pay any other company or the employees of any other company for the referral of settlement service business.

(c) No split of charges except for actual services performed. No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed. A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this Part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

(d) Thing of value. This term is broadly defined in section 3(2) of RESPA (12 U.S.C. 2602(2)). It includes, without limitation, monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at

a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or in part on the amount of business referred, trips and payment of another person's expenses, or reduction in credit against an existing obligation. The term "payment" is used throughout §§ 3500.14 and 3500.15 as synonymous with the giving or receiving any "thing of value" and does not require transfer of money.

. . .

Fed.R.Civ.P. 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions:

. . .

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument

> for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;
>
> . . .

STATEMENT OF THE CASE

Factual background:

On January 22, 1996, Larry Chandler and Joanne Chandler secured the services of Custom Mortgage, Inc. ("Custom"), a mortgage broker, to help them refinance their home. Although the Chandlers were unaware of it at the time, Custom had a standing agreement with Norwest Bank Minnesota, National Association ("Norwest") by which Norwest, through its agent Equicon Corporation ("Equicon"), was *contractually obligated* to purchase loans originated by Custom on the day of their closing. The Agreement provided that Custom would "sell, assign, transfer and deliver to Trustee (Norwest), on behalf of the Trust, on each Settlement Date . . . all of Seller's (Custom's) right, title and interest in the loans." The Agreement also provided that "[s]ponsor (Equicon) on behalf of the Trustee (Norwest), will wire transfer the Purchase Price pursuant to Seller's (Custom's) written instructions on the Settlement Date."

Because Norwest had already agreed to purchase the Chandlers' loan at the time it closed, the arrangement

between Custom and Norwest precisely fits Regulation X's definition of "table funding" ("a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds," 24 C.F.R. §3500.2(b)). Norwest had the right to acquire the Chandlers' loan *on the closing date*. This sequence of events shows that Custom and Norwest participated in a "table-funded" loan that is subject to RESPA. 24 C.F.R. §3500.2.

The Chandlers' loan closed on January 26, 1996 and was simultaneously assigned to Norwest. That day, Custom drew on its credit line at CoreStates Bank, National Association ("CoreStates") and directed CoreStates to deposit $57,156.25 to Custom's warehouse account, which represented the amount of the Chandlers' loan ($60,175) *minus* the $3,018.75 loan origination fee and loan discount fee. Custom disbursed these funds on the same day, January 26, 1996.

Two business days later, on January 30, 1996, Equicon, *on behalf of Norwest,* funded the Chandlers' mortgage loan by paying Custom Mortgage $64,316.68. That figure consisted of the full amount of the Chandlers' note, *including* the $3,018.75 loan origination fee and loan discount fee, $110.41 for five days' interest on Custom's credit line advance, and $3,881.27 in yield spread points.

Custom received $6,900.02 in fees for originating and referring a $57,156.25 mortgage to Norwest. For its part in table funding the Chandlers' loan, Custom received approximately *12% of the loan balance* from the Chandlers and Norwest.

Procedural background:

The Chandlers filed this case as a class action in the United States District Court for the Eastern District of Missouri on April 19, 1996 alleging that Custom and Norwest had imposed or paid excessive fees for the origination of their table-funded mortgage loan in violation of RESPA and Regulation X (Count I) and state consumer fraud statutes (Count II). All parties subsequently filed motions for summary judgment and Norwest moved for sanctions against the Chandlers. On March 24, 1997, the United States District Court for the Eastern District of Missouri (Perry, J.) granted Norwest's and Custom's motions for summary judgment and granted Norwest's motion for sanctions.

The Chandlers timely appealed to the United States Court of Appeals for the Eighth Circuit. In its decision of March 3, 1998, a majority of a panel of the Eighth Circuit (Bowman, Floyd R. Gibson, and Locken, Circuit Judges) affirmed the decision of the District Court, holding that the Chandlers failed to produce any evidence to show that their mortgage loan was table-funded and that the District Court's imposition of sanctions on plaintiffs' counsel was proper. In a strongly-worded dissent, Judge Gibson reached *exactly the opposite* conclusion. The Chandlers timely petitioned for a rehearing *en banc*, which was denied on April 24, 1998. For the reasons that follow, the Chandlers now respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

ARGUMENT

I.

THE EIGHTH CIRCUIT'S IMPOSITION OF SANCTIONS CREATES A SERIOUS CONFLICT OF THE LAW OF FED.R.CIV.P. 11 AMONG THE CIRCUIT COURTS.

This case involves questions of first impression concerning the interpretation and application of the Real Estate Settlement Procedures Act, 12 U.S.C. §2601 *et seq.* ("RESPA"). The Eighth Circuit, over a dissent, affirmed the District Court's grant of summary judgment in favor of the defendants holding that the Chandlers' loan transaction was not "tabled-funded" and was therefore a secondary market transaction exempt from RESPA. In his dissent, however, Judge Gibson explicitly found that "the transaction involved in this case is a pure circumvention of the Congressional legislation relating to federally related mortgage financing and marketing." App. 12.

Both the majority and dissent reviewed the same evidence, including the purchase and sale agreement between the defendants that obligated Custom to sell the Chandlers' loan to Norwest on the Chandlers' closing date. Both the majority and the dissent reached diametrically different conclusions. The majority stated:

> We agree with the District Court that the Chandlers failed to produce even a scintilla of evidence that Norwest was involved in their mortgage loan transaction in any capacity other than as a trustee of the Equicon Trust, or that Custom table funded for Norwest their mortgage loan as defined under Regulation X, or that Norwest paid improper referral fees or unearned

> and excessive fees to custom in violation of Section 8 of RESPA.

App. 7-8. Based on this interpretation of the facts, the majority affirmed the imposition of Rule 11 sanctions.

Reaching a completely different conclusion, however, Judge Gibson, dissenting, stated:

> Based on the structure of the overall transaction, I believe that the 'real source of funding' for the Chandlers loan was Equicon, acting on behalf of Norwest. . . . *[T]he facts* show that Custom and Norwest engaged in *a sham transaction which was purposely designed to avoid coverage under RESPA.* I do not believe Congress authorized this type of transaction; nor do I believe that this type of transaction is deserving of our judicial stamp of approval. Therefore, I would reverse the district court's summary judgment in favor of Norwest. Accordingly, I would also reverse the district court's imposition of Rule 11 sanctions on the Chandlers' attorney.

App. 12 (emphasis added). Such a dramatic division among the members of the panel who heard this appeal is a clear signal that sanctions are extremely inappropriate in this case.

The majority held that the Chandlers did not produce evidence to support the *majority's interpretation* of the law. However, that interpretation was directly contrary to the Chandlers' theory of the case. The dissent agreed with the Chandlers' interpretation of RESPA and found that the facts presented by the Chandlers adequately supported that interpretation.

The sanctions result is an insupportable and internally inconsistent decision that contravenes the language

and purpose of Rule 11 and well-settled case law in virtually every court of appeal. The majority imputes the Chandlers' attorneys with the sanctionable behavior of failing to produce even a "scintilla" of evidence, while the dissent finds that they presented enough evidence to survive a motion for summary judgment and take the case to a jury. The majority thus finds that a fellow judge's dissenting opinion is sanctionable—a clear indication that the imposition of sanctions was inappropriate.

Rule 11 cannot be read in such a way that it chills vigorous advocacy. *Cooter & Gell v. Hartmarx Corporation*, 496 U.S. 384, 393 (1990). Rule 11's text permits attorneys to advance claims that are "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed.R.Civ.P. 11(b)(2). If reasonable judicial minds can differ on a point of law or evaluation of a set of facts, sanctions are not proper. *Mid-Tech Consulting, Inc. v. Swendra*, 938 F.2d 885, 888 (8th Cir. 1991) (inquiry was adequate even if it was insufficient to avoid a motion to dismiss); *Johnson v. Longview Independent School Dist.*, 926 F.2d 382, 383 (5th Cir. 1991).

The circuit courts have unequivocally held that if no appellate court has previously considered, *much less rejected*, the legal position argued by the Chandlers, sanctions are inappropriate. *Milwaukee Concrete Studios v. Fjeld Mfg. Co.*, 8 F.3d 441 (7th Cir. 1993). Sanctions are improper if there is any *objectively reasonable argument* in support of a view of what the law is or what it should be. *Davis v. Carl*, 906 F.2d 533 (11th Cir. 1990). Where areas of law are not clear-cut or well-settled, sanctions

should not be imposed on parties for a good-faith argument for the extension, modification or reversal of existing law. *Fudge v. Penthouse International, Inc.*, 840 F.2d 1012 (1st Cir. 1988). Here, appellants presented a good-faith argument that defendants violated RESPA. No court of appeal had previously ruled on appellants' theory. Appellants were capable of convincing one member of the three-judge panel in the Eighth Circuit that their legal theories and factual support were sound.

As deployed by the Eighth Circuit, Rule 11 will now chill attorneys who wish to pursue new legal or factual theories—a result that is directly contrary to Rule 11's purpose and conflicts with the well-settled case law of Rule 11. *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987) (*quoting* Advisory Committee Note to Rule 11) (Rule 11 was not intended to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories"); *Local 938 v. B.R. Starnes Co.*, 827 F.2d 1454, 1458 (11th Cir. 1987) ("Rule 11 is intended to deter frivolous suits, not to deter novel legal arguments or cases of first impression"); *Zaldivar v. Los Angeles*, 780 F.2d 823 (9th Cir. 1986) (unsettled areas of law are not appropriate grounds for imposition of sanctions).

In the case at bar, there is no consensus that the Chandlers' legal theory is invalid and, therefore, sanctionable—in fact, quite the opposite is true. Even the mortgage industry itself is uncertain whether the theory presented by the Chandlers constitutes a violation of RESPA. *See* Buckley, Jeremiah S., and Joseph M. Kolar, "What RESPA Has Wrought," 2 *Savings & Community Banker* 2, p. 32 (Feb. 1993) ("[t]he vagueness of this secondary market exemption leaves many issues to be re-

solved. For instance, does the secondary market exemption apply where a broker funds a closing in its name with a warehouse lender's check and immediately assigns the loan to an investor or wholesale lender? What if the investor or an affiliate of the investor provides the warehouse loan?"). In a case such as this, where a Circuit Judge agreed with both the factual and the legal arguments made by the Chandlers, the imposition of Rule 11 sanctions is unintelligible.

In *Old Republic Insurance Co. v. Chuhak & Tecson*, P.C., 84 F.3d 998 (7th Cir. 1996), the Seventh Circuit considered a similar, but less extreme, situation in which one district judge imposed sanctions on a party for following the order of another judge in the same district. The Seventh Circuit was very disturbed by the situation and harshly criticized the impropriety of the second judge's imposition of sanctions:

> And we have had to endure the spectacle of one judge imposing sanctions on a party for relying on the opinion of another judge of the same court in a nearly identical case. A procedure at once so redundant and so unseemly mocks the efforts of the federal judiciary to reassure skeptics that we are trying with some success to achieve expedition and economy in the judicial process.

Id. at 1000. Noting that the second judge "came perilously close to pronouncing [the first judge's] decision sanctionable," the Seventh Circuit reversed the award of sanctions. *Id.*

Here, the Eighth Circuit's decision is even more remarkable. The Eighth Circuit *has* pronounced the dissenting judge's decision sanctionable. The imposition of

sanctions is completely insupportable and the Eighth Circuit's decision creates a serious conflict of the law of Fed.R.Civ.P. 11 among the circuit courts.

II.

THE EIGHTH CIRCUIT'S DECISION EVISCERATES RESPA AND PROVIDES LENDERS AND BROKERS WITH A CLEAR ROADMAP FOR EVASION.

Congress passed RESPA to protect consumers by prohibiting mortgage brokers and lenders from receiving, charging or paying fees that are unearned or merely for the referral of business with respect to mortgages. Although RESPA exempts secondary market transactions, Regulation X makes it clear that courts must consider the *real source of funding* in determining whether a transaction is a secondary market transaction and therefore exempt from RESPA's protections. Loans that are "table-funded" are not secondary market transactions and therefore fall under the provisions of RESPA. Table-funded loans are those in which "a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds". 24 C.F.R. §3500.2(b).

The Eighth Circuit's opinion now permits lenders to table fund loans and *still evade RESPA* by merely waiting a few days to get paid and moving the money from one pocket to another. The result is that mortgage brokers can now table fund loans without incurring any risk whatsoever while avoiding the requirements of RESPA.

The method by which this evasion is possible is quite clever. In this case, Norwest, through its agent Equicon, had *already agreed to fund* the Chandlers' loan before

Custom, the mortgage broker, agreed to refinance the Chandlers' mortgage. Norwest had previously entered into a Purchase and Sale Agreement with Custom by which Norwest *agreed to purchase loans from Custom in advance*. Custom, then, incurred absolutely no risk when it agreed to disburse funds from its line of credit with CoreStates to the Chandlers, because Custom was *already assured* of repayment of the loan amount, plus hefty fees, from Norwest pursuant to the Purchase and Sale Agreement. As a result, Custom received large fees from both the Chandlers and Norwest totaling *approximately 12%* of the loan principal while incurring absolutely no risk.

According to the Eighth Circuit, the fact that Custom waited a few days to get paid by Norwest is enough to permit the parties to evade RESPA. Specifically, the Eighth Circuit held that "the Chandlers have failed to produce any evidence that the $57,156.25 disbursed to them on January 26, 1996 in connection with their mortgage loan came from any source other than Custom." App. 7.

The Eighth Circuit missed the point and, indeed, missed the Chandlers' entire theory of the case. Although Custom technically disbursed the funds, it already had an agreement with Norwest to be fully reimbursed for that payment. The Chandlers were aware that Custom waited a few days to get paid by Norwest in order to make the loan look as if it were not table-funded. The Chandlers alleged, however, that the *preexisting agreement* between Custom and Norwest showed that the loan was table-funded.

In light of the Eighth Circuit's, opinion, any mortgage broker with access to a line of credit can now engage in

table funding without complying with RESPA—and any bank will likely be happy to extend credit if it is assured of repayment plus interest within a few days with no risk. As in this case, brokers can now extend loans to consumers that the brokers *have already sold to third party lenders* pursuant to preexisting agreements (which used to be the definition of table funding before the Eighth Circuit's opinion), then proceed to pay the consumer from the broker's own line of credit, only to be reimbursed, plus fees, by the true source of funding a few days later.

The Chandlers provided evidence clearly showing that Custom sold their loan before disbursement to them, paid them from a line of credit, then, after five days (including a weekend) had passed, received complete repayment, plus large fees, from Norwest. Custom therefore received an incredible 12% of the principal in fees for absolutely nothing—Custom incurred no risk whatsoever during any part of the transaction.

This scenario is exactly the kind of abuse that RESPA was designed to prevent. RESPA bans the following activities with respect to table-funded loans:

> (a) Business referrals. No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
>
> (b) Splitting charges. No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in

> connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. §2607(a), (b). In deciding whether a transaction is table-funded (*i.e*, constitutes an "unrelated" secondary market transaction), HUD Regulation X makes it clear that *substance* predominates over *form*:

> A bona fide transfer of a loan obligation in the secondary market is not covered by RESPA and this part, except as set forth in section 6 of RESPA and § 3500.21. *In determining what constitutes a bona fide transfer, HUD will consider the real source of funding and the real interest of the funding lender.*

24 C.F.R. §3500.5(b)(7) (emphasis added). The principle that substance prevails over form is universally applicable to many areas of law, including tax law, *Gregory v. Helvering*, 293 U.S. 465 (1935), and the Truth in Lending Act, *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155 (1981). Transactions such as the one in the case at bar that have no other purpose than to *avoid a rule of law* should be viewed by the Court in their true light. *Id.* Here, the defendants engaged in a series of transactions the net effect of which was to avoid the strictures of RESPA and permit the parties to engage in activities that RESPA was designed to prohibit. As such, the defendants' elaborate shuffle of funds should be viewed for what it is—an attempt to avoid RESPA.

The Eighth Circuit ignored the clear evidence provided by the Chandlers showing that the *real source of funding* was Norwest, via Equicon. Custom incurred absolutely no risk whatsoever in connection with the Chandlers' loan. The dissent recognized that the defendants'

scheme constituted a "sham transaction which was purposely designed to avoid coverage under RESPA" because the "real source of funding" for the Chandlers' loan was "Equicon, acting on behalf of Norwest." App. 12.

The Eighth Circuit's opinion eviscerates RESPA and provides a roadmap for mortgage brokers and lenders to evade RESPA.

III.

THE EIGHTH CIRCUIT SILENTLY REWRITES RESPA TO INCLUDE A TRUSTEE EXCEPTION.

The Eighth Circuit also ruled (albeit silently) on another crucial and unresolved question of law in its opinion—that of trustee liability under RESPA. The Eighth Circuit held that Norwest was not liable under RESPA because Norwest acted as a trustee of the Equicon Trust. The majority of the panel stated:

> We agree with the District Court that the Chandlers failed to produce even a scintilla of evidence that Norwest was involved in their mortgage loan transaction *in any capacity other than as a trustee of the Equicon Trust* . . . .

App. 7 (emphasis added). The Chandlers did not produce such evidence because they alleged that *Norwest was liable as trustee for Equicon.* The Eighth Circuit *assumes* that there is no such thing as trustee liability under RESPA with absolutely no discussion of the issue and no citation of any authorities. The question, however, is far from obvious or settled.

RESPA prohibits any "person" from giving or accepting a fee, kickback, or thing of value for referrals or for

services not actually performed. 12 U.S.C. § 2607(a), (b). RESPA defines "person" to include "individuals, corporations, associations, partnerships and trusts." 12 U.S.C. § 2602(5). Norwest is therefore a "person" as defined by RESPA.

RESPA contains *no exception for trustees* in the definition of "person." Moreover, Missouri law holds that a trustee is the "legal owner of the trust property, in which the beneficiaries have equitable ownership." *Farris v. Boyke*, 936 S.W.2d 197, 200 (Mo.Ct.App. 1996); *accord*, *McDaniel Title Company v. Lemons*, 626 S.W.2d 686 (Mo.Ct.App. 1981) (trustee owns legal title); *Masterson v. Plummer*, 343 S.W.2d 352 (Mo.Ct.App. 1961) (trustee retains legal title). Because a trustee owns legal title to the trust property, and because both a corporation and a trust are "persons" under RESPA, there is absolutely no support for the Eighth Circuit's *assumption* that Norwest, as a trustee, is not bound by RESPA. Generally, the law does not exculpate agents from illegal conduct because the action was undertaken on behalf of another. *See, e.g., Restatement (Second) of Agency* §§ 343-351; *Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959).

The Eighth Circuit, then, silently carved out a trustee exception in RESPA that did not exist before it's opinion. What is the foundation for that exception? The plain language of RESPA does not contain it, and the plain language of the statute controls. *Heintz v. Jenkins*, 514 U.S. 291, 297 (1995).

CONCLUSION

For all the reasons stated above, petitioners Larry Chandler and Joanne Chandler respectfully request that the Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 97-2437

Larry Chandler, Joanne Chandler of Jefferson County, on behalf of themselves and all others similarly situated,	*	
Appellants,	*	Appeal from the United States District Court for the Eastern District of Missouri
v.	*	
Norwest Bank Minnesota, National Association; Custom Mortgage, Inc.,	*	
Appellees.	*	

Submitted: December 10, 1997
Filed: March 3, 1998

Before BOWMAN, FLOYD R. GIBSON, and LOKEN, Circuit Judges.

BOWMAN, Circuit Judge.

Joanne and Larry Chandler appeal from the grant of summary judgment entered by the District Court[1] in

[1] The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri.

favor of Norwest Bank Minnesota, N.A. (Norwest) and Custom Mortgage, Inc. (Custom) on the Chandlers' claims under the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-2617 (1994) (RESPA). The Chandlers also appeal the District Court's imposition of sanctions under Rule 11. *See* Fed. R. Civ. P. 11. We affirm.

I.

On January 22, 1996, the Chandlers entered into a mortgage loan transaction with Custom to refinance their home. The Chandlers gave Custom a deed of trust on their home as security for a loan in the total amount of $60,375.00, including a 2 percent "loan origination fee" (amounting to $1,207.50) and a 3 percent "loan discount fee" (amounting to $1,811.25) payable to Custom for its services in obtaining the loan. The parties do not dispute that the net loan proceeds ultimately disbursed to the Chandlers were $57,156.25.

In connection with the mortgage loan transaction, the Chandlers signed a document entitled "Notice of Assignment, Sale or Transfer of Servicing[2] Rights," informing the Chandlers that "the right to collect payments from you is being assigned, sold or transferred" effective Jan-

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[2] "Servicing" is defined under RESPA regulations as "receiving any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan . . . and making the payments to the owner of the loan . . . of principal and interest and such other payments . . . as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract." 24 C.F.R. § 3500.2(b) (1997).

uary 22, 1996 from Custom to "Norwest Bank Minnesota, National Association as Trustee," and identifying the Chandlers' new mortgage servicer as LSI Financial Group.[3] Appellants' App. at 14. This notice does not refer in any way to the finding sources for the Chandlers' loan, nor does it refer to the sale of the Chandlers' mortgage loan itself Although this paperwork was completed on January 22, 1996, the Chandlers' loan did not close until January 26, 1996, after their option to cancel the transaction had expired. The Chandlers concede that the loan closed with Custom identified as the lender.

Custom obtained the capital necessary to fund the Chandlers' loan through its pre-existing line of credit with CoreStates Bank, and, pursuant to that credit arrangement, CoreStates transferred $57,156.25 to Custom's warehouse account on January 26, 1996. On that same day, Custom disbursed $57,156.25 to the Chandlers.

On January 31, 1996, Equicon Corporation, in accordance with a "Purchase and Sale Agreement" between Equicon, Norwest, and Custom, purchased the Chandlers' mortgage loan from Custom by depositing $57,156.25 into Custom's CoreStates bank account, whereupon Custom repaid its outstanding loan balance,

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[3] RESPA requires that those making federally related mortgage loans "shall disclose" at the time application is made "whether the servicing of any such loan may be assigned, sold, or transferred," and, if the person making the loan does not engage in servicing, "that there is a present intent . . . to assign, sell, or transfer the servicing of such loan." 12 U.S.C. § 2605(a)(1) (1994); *see also* 24 C.F.R. § 3500.21.

plus interest, to CoreStates on the same day. Equicon purchased the Chandlers' mortgage loan for deposit into the Equicon Loan Purchase Trust established by Equicon to hold various assets, principally mortgages, that would ultimately secure certificates sold to investors. At the direction of Equicon, and pursuant to the parties' agreement, Custom assigned the Chandlers' loan to Norwest, as trustee of the Equicon Trust, for deposit into the trust. Norwest was appointed trustee of the Equicon Trust under a pooling and servicing agreement dated January 1, 1995 naming Equicon as the sponsor and LSI Financial Group as the servicer of the trust. Norwest's duty as trustee was to be the primary custodian of the mortgage loan documents Equicon purchased from Custom and other lenders.

Equicon subsequently sold the mortgages in the Equicon Trust, including the Chandlers' mortgage loan, to another trust, "Access Financial Lending Corporation Series 1996-3," and Norwest was also appointed trustee of this trust. In its role as trustee of the Access Trust, Norwest is responsible for holding the mortgage documents, ensuring that payments on the mortgages are properly channeled to the investors pursuant to the trust documents, and providing reports to the investors. As trustee of both the Equicon Trust and the Access Trust, Norwest holds no beneficial ownership interest in any of the mortgage loans held in the trusts.

In April 1996, the Chandlers filed suit on behalf of themselves and two putative classes of other allegedly similarly situated residential mortgage loan customers claiming that Custom "sold" their loan to Norwest, rather than to Equicon, prior to closing, rather than

after closing, and that their loan was "table funded" by Custom for Norwest.[4] The Chandlers essentially allege that Norwest, not Custom, was the actual source of funding for their mortgage loan. Consequently, they claim that Norwest, as the purported "owner" of the loan prior to closing, paid excessive and unearned fees to Custom, and that both Norwest and Custom acted in violation of Section 8 of RESPA, 12 U.S.C. § 2607.

The District Court granted Norwest's motion for summary judgment, finding that Norwest lacked any involvement in the Chandlers' loan transaction. Likewise, the court granted Custom's motion for summary judgment, finding that Custom did not table fund the Chandlers' mortgage loan and that the loan transaction was a bona fide "secondary market transaction" exempt from RESPA. *See* 24 C.F.R. § 3500.5(b)(7). In addition, the District Court imposed sanctions on the Chandlers' attorneys under Rule 11 for their failure to investigate the facts prior to filing the lawsuit. The Chandlers appeal the District Court's grant of summary judgment to Norwest and Custom, and the court's imposition of Rule 11 sanctions.

II.

We review a grant of summary judgment de novo, using the same standard governing the district court's decision. *See Stevens v. St. Louis Univ. Med. Ctr.*, 97

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[4] Under RESPA, "table funding" means "a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds." 24 C.F.R. § 3500.2(b) (1997).

F.3d 268, 270 (8th Cir. 1996). "We will affirm the judgment if the record shows that there is no genuine issue of material fact and that the prevailing party is entitled to judgment as a matter of law." *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1264 (8th Cir.), *cert. denied*, 136 L. Ed. 2d 119, 117 S. Ct. 179 (1996) (citation omitted).

The Chandlers' claim rests on alleged violations by Norwest and Custom of RESPA. Consequently, the Chandlers must establish that their mortgage loan transaction is covered by the Act. If the transaction falls outside the coverage of RESPA, the Chandlers' claim necessarily fails.

Specifically, the Chandlers contend that Norwest and Custom table funded the Chandlers' mortgage loan thus bringing the transaction under the coverage of RESPA, and that Norwest thereafter violated Section 8 of the Act by paying Custom referral fees or unearned and excessive fees. Custom, according to the Chandlers, also violated Section 8 of RESPA by receiving the referral fees or excessive and unearned fees from Norwest. Norwest and Custom, on the other hand, claim that the Chandlers' mortgage loan was sold to Equicon pursuant to a transaction that is exempt from RESPA and that the Chandlers' claims fail as a matter of law.

RESPA and its accompanying regulations "apply to all federally related mortgage loans," 24 C.F.R. § 3500.5(a), including the Chandlers'. Section 8 of RESPA prohibits all kickback and referral fee arrangements whereby any payment is made or "thing of value" is furnished for the referral of real estate settlement services, 12 U.S.C. § 2607(a), and also prohibits a person that renders a settlement service from splitting with or rebating to any

other person any portion of the charges associated with real estate settlement services except in return for services actually performed, *see id.* § 2607(b); *see also Bloom v. Martin*, 77 F.3d 318, 320 (9th Cir. 1996); *Durr v. Intercounty Title Co. of Illinois*, 14 F.3d 1183, 1186 (7th Cir.), *cert. denied*, 513 U.S. 811, 130 L. Ed. 2d 20, 115 S. Ct. 63 (1994); *Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 271 (7th Cir. 1985). Section 8 specifically permits, however, "the payment to any person of a bona fide salary or compensation or other payment for . . . services actually performed." 12 U.S.C. § 2607(c)(2).

The regulations under RESPA, Regulation X, exempt from the provisions of Section 8 those fees and charges paid in connection with legitimate secondary market transactions involving a "*bona fide* transfer of a loan obligation in the secondary market" taking into consideration "the real source of funding and the real interest of the funding lender." 24 C.F.R. § 3500.5(b)(7). Regulation X excludes table funded transactions from the scope of a legitimate secondary market transaction, thus, table funded transactions are covered by Section 8 of RESPA. *See id.* In order to prevail, the Chandlers must present some evidence that their loan was table funded—that the loan was funded at settlement by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds. *See id.* § 3500.2(b).

We agree with the District Court that the Chandlers have failed to produce any evidence that the $57,156.25 disbursed to them on January 26, 1996 in connection with their mortgage loan came from any source other than Custom. The documentation prepared by the par-

ties to the transaction indicates that Custom obtained the capital necessary to fund the Chandlers' mortgage loan exclusively through its credit arrangement with CoreStates.[5] Furthermore, the evidence establishes that Custom repaid its CoreStates loan, with interest, on January 31, 1996. Contrary to the Chandlers' assertions, their mortgage loan was not table funded by Norwest—their loan was not funded by an advance of loan funds to Custom by Norwest coupled with a contemporaneous assignment of the loan by Custom to Norwest.

The Chandlers point to the existence of the Purchase and Sale Agreement between Custom, Equicon, and Norwest as evidence to support their allegation that Norwest, as trustee of the Equicon Trust, was somehow the source of funding for the Chandlers' mortgage loan. This argument is without merit. The uncontroverted evidence confirms that Custom closed the loan in its own name with funds borrowed from CoreStates under an established line of credit. Three days later, the loan was sold by Custom to Equicon, not Norwest. Equicon transferred by wire the funds necessary to purchase the Chandlers' loan to Custom's CoreStates account, and Custom thereafter repaid its outstanding loan balance to CoreStates. The Purchase and Sale Agreement cannot and does not raise a material question of fact necessary to defeat a summary judgment motion. The District Court did not err in granting summary judgment to Norwest and Custom.

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[5] The Chandlers have neither alleged nor shown any affiliation between CoreStates and Norwest.

III.

We next turn to the District Court's decision to impose Rule 11 sanctions against the Chandlers' counsel. Rule 11 requires all parties who file a complaint in federal court to ensure "that to the best of the person's knowledge . . . formed after an inquiry reasonable under the circumstances, . . . the claims . . . are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law" and that the "allegations and other factual contentions have evidentiary support." Fed. R. Civ. Proc. 11. The rule allows a district court to impose an "appropriate sanction" when a party files a complaint in derogation of this responsibility. *Id.* We review a court's decision to impose Rule 11 sanctions for abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990); *Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678, 682 (8th Cir. 1997).

The District Court determined that, while the Chandlers arguably may have had a reasonable belief that their claim against Custom had or was likely to have evidentiary support, their counsel could not have conducted the inquiry necessary to support the Chandlers' claim against Norwest. We agree with the District Court that the Chandlers failed to produce even a scintilla of evidence that Norwest was involved in their mortgage loan transaction in any capacity other than as trustee of the Equicon Trust, or that Custom table funded for Norwest their mortgage loan as defined under Regulation X, or that Norwest paid improper referral fees or unearned and excessive fees to Custom in violation of Section 8 of RESPA. In these circum-

stances, the District Court did not abuse its discretion by imposing sanctions under Rule 11.

IV.

For the foregoing reasons, we affirm the District Court's grant of summary judgment to Norwest and Custom and the court's imposition of Rule 11 sanctions against the Chandlers' counsel.

FLOYD R. GIBSON, Circuit Judge, dissenting:

I respectfully dissent. The Real Estate Settlement Procedures Act ("RESPA") was enacted "to insure that consumers throughout the Nation . . . are protected from unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. § 2601 (1994). To facilitate this purpose, RESPA prohibits kickbacks and unearned fees:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. § 2607(a) (1994). While secondary market transactions are exempted from RESPA's coverage, *see* 24 C.F.R. § 3500.5(b)(7) (1997), I believe the Chandlers presented a genuine issue of material fact as to whether the arrangement designed by Custom, Norwest, and Equicon was a bona fide secondary market transaction. Therefore, I would reverse the district court's judgment.

The regulations under RESPA provide that "[a] *bona fide* transfer of a loan obligation in the secondary market is not covered by RESPA." *Id.* The regulation further provides that "in determining what constitutes a *bona fide* transfer, HUD will consider the real source of funding and the real interest of the funding lender." *Id.* Custom was able to show that the funds it borrowed for the Chandlers' loan came from its direct line of credit with CoreStates. However, Custom had previously entered into a Purchase and Sale Agreement with Equicon and Norwest, under which Equicon would purchase loans from Custom to be held in trust with Norwest as the Trustee. Custom and Equicon had already agreed that Equicon would transfer funds to Custom's CoreStates account to cover the loan amount shortly after the Chandlers' loan closed. In fact, Custom and Equicon notified CoreStates of the planned funds transfer on January 3, 1996, three weeks before Custom provided the Chandlers with the loan amount. Therefore, even though Custom borrowed $57,156.25 against its line of credit with CoreStates, Custom knew that "[Equicon], on behalf of [Norwest]," Appellant's App. at 16, would deposit that amount shortly afterwards. In fact, for Custom's part in the deal, it received $3,018.75 from the Chandlers in loan origination and discount fees, as well as $7,160.43 from Equicon, on behalf of Norwest which included (1) the $3,018.75 loan origination and discount fees; (2) interest on Custom's loan from CoreStates; and (3) $3,881.27 in yield spread points.

A bona fide secondary market transaction is one where a mortgage lender makes loans for its own portfolio and finances these loans from its own or borrowed funds and holds the loans for varying periods of time, or

until maturity, with the option of selling its loans, usually in batches on the open market, and not in a pre-ordained procedure where a party makes a loan knowing it will be transferred in due course in a matter of days to the ultimate lender. It appears to me that the transaction involved in this case is a pure circumvention of the Congressional legislation relating to federally related mortgage financing and marketing.

Based on the structure of the overall transaction, I believe that the "real source of funding" for the Chandlers' loan was Equicon, acting on behalf of Norwest.[6] In my view, the Chandlers presented a genuine issue of material fact as to whether Norwest gave and Custom accepted a fee based on Custom's servicing of the Chandlers' loan in violation of RESPA. *See* 12 U.S.C. § 2607(a). After viewing the facts in the light most favorable to the Chandlers, *see Reich v. ConAgra, Inc.*, 987 F.2d 1357, 1359 (8th Cir. 1993), the facts show that Custom and Norwest engaged in a sham transaction which was purposely designed to avoid coverage under RESPA. I do not believe Congress authorized this type of transaction; nor do I believe that this type of transaction is deserving of our judicial stamp of approval.

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[6] A table funded loan is one in which "a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds." 24 C.F.R. § 3500.2 (1997). The right to service the Chandlers' loan and to collect payments was assigned to Norwest on January 22, 1996. While the loan funds had not been deposited into Custom's CoreStates account at the time of closing, the parties had already agreed that such a transfer would occur. In fact, the record evidence established that Equicon deposited a total of $64,316.68 into Custom's CoreStates account just five days after the loan closed.

Therefore, I would reverse the district court's summary judgment in favor of Norwest. Accordingly, I would also reverse the district court's imposition of Rule 11 sanctions on the Chandlers' attorney.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-2437EMSL

Larry Chandler, et al.,	*	
	*	
Appellants,	*	Order Denying
v.	*	Petition for
	*	Rehearing and
Norwest Bank Minnesota, etc., et al.,	*	Suggestion for
	*	Rehearing En Banc
	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion.

The petition for rehearing by the panel is also denied.

April 24, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

[Filed March 24, 1997]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LARRY CHANDLER, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	No. 4:96CV761 CDP
	)	
NORWEST BANK MINNESOTA, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

In accordance with the Memorandum and Order entered this same date,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that defendant Custom Mortgage, Inc. and Norwest Bank Minnesota, N.A. shall have summary judgment against plaintiffs, and plaintiffs shall recover nothing on their complaint. Both defendants shall recover their taxable costs of this action from plaintiffs.

/s/ Catherine D. Perry
CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 24th day of March, 1997.

App. 16

[Filed March 24, 1997]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LARRY CHANDLER, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	No. 4:96CV761 CDP
	)	
NORWEST BANK MINNESOTA, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on various motions, including cross-motions for summary judgment and cross-motions for Rule 11 sanctions. For the reasons set forth below, the Court will grant defendants' motions for summary judgment, and will grant the motion of defendant Norwest for sanctions against plaintiffs' counsel.

I. The Complaint

Plaintiffs Larry D. Chandler and Joanne R. Chandler bring this action on behalf of themselves and two putative classes of other allegedly similarly situated residential mortgage loan customers. The Chandlers allege that they entered into a residential mortgage loan transaction with defendant Custom Mortgage, Inc., to refinance their home. They allege that the loan was "table funded" for Custom by defendant Norwest Bank Minnesota, National Association; plaintiffs' complaint defines

"table funding" as occurring "when a company which is essentially a mortgage broker disburses funds which belong to a third-party lender." Plaintiffs allege that Norwest and Custom have a policy and practice of charging fees that are "merely for referral of business or are duplicative or are for services that are not actually performed or are only nominally performed in connection with the settlement of real estate transactions." Plaintiffs allege that as a result of this policy and practice of defendants, they were charged fees for which no or only nominal services were performed, in violation of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.* ("RESPA"). Count I of their complaint alleges violations of 12 U.S.C. § 2607 and 24 C.F.R. § 3500.14(c) by both defendants; Count II alleges that defendant Norwest violated all 50 states' consumer fraud statutes.

II. RESPA

RESPA prohibits the payment or receipt of fees, kickbacks, or things of value in exchange for referrals of business incident to or part of a real estate settlement service involving federally regulated mortgage loans. 12 U.S.C. § 2607(a) (1995); *see also U.S. v. Grissom*, 814 F.2d 577, 579 (10th Cir. 1987). Moreover, RESPA forbids the splitting of charges for real estate settlement services unless they are for services actually performed. 12 U.S.C. § 2607(b); *see also Durr v. Intercounty Title Co. of Illinois*, 14 F.3d 1183, 1186 (7th Cir.), *cert. denied* 115 S. Ct. 63 (1994).

The regulations under RESPA, at 24 C.F.R. § 3500.5(b)(7), exempt from the provisions of 12 U.S.C.

§ 2607 and 24 C.F.R. § 3500.14(c) those fees and charges paid in connection with legitimate "secondary market transactions"; however, the section excludes "table funded" transactions from the scope of legitimate secondary market transactions. *See* 24 C.F.R. § 3500.5(b)(7) ("A bona fide transfer of a loan obligation in the secondary market is not covered by RESPA and this part, except as set forth in section 6 of RESPA and section 3500.21. In determining what constitutes a bona fide transfer, HUD will consider the real source of funding and the real interest of the funding lender."); *see also John Culpepper, et al. v. Inland Mortgage Corp.*, 1997 WL 39552, at *3 n.2 (N.D. Ala. Jan. 31, 1997). "Table funding" refers to a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds. 24 C.F.R. § 3500.2 (1995). Therefore, loans are table funded only if the advance of the loan funds and the assignment of the loan to the person advancing the funds occur simultaneously.

III. The Undisputed Facts

The parties have presented affidavits, deposition testimony, and exhibits in support of their cross-motions for summary judgment. There are no genuine disputes of material fact.

On January 22, 1996, plaintiffs entered into a mortgage loan transaction with Custom for the purpose of refinancing their home. Although the initial documents were signed on January 22, the loan was actually closed on January 26, 1996, after plaintiffs' option to cancel period had expired; plaintiffs signed a "confirmation cer-

tificate" on January 26, 1996. The total amount of the loan was $60,375.00; the Chandlers' gave Custom a deed of trust on their home as security for the loan. Custom charged plaintiffs a 2% "loan origination fee" (amounting to $1,207.50) and a 3% "loan discount fee" (amounting to $1,811.25).

Custom had a line of credit arrangement with Corestate Bank, Philadelphia, Pennsylvania, and Corestate Bank transferred $57,156.25 to Custom's warehouse account on January 26, 1996. Corestate that same day wired the funds to plaintiffs' Enterprise Bank account in St. Louis, Missouri, and the uncontroverted evidence establishes that the loan payout to the plaintiffs was funded entirely by this January 26, 1996, transfer of funds. On January 30, 1996, Equicon Corporation purchased plaintiffs' loan from Custom by depositing $57,156.25 into Custom's Corestate bank account. Custom then repaid its loan to Corestate on January 31, 1996.

At the direction of Equicon, Custom assigned the Chandler mortgage to Norwest, as trustee.[1] Equicon later became Access Financial Lending, Inc. Some time after this transaction, Access sold the mortgages in the trust to another trust, of which Norwest was also the trustee. On January 1, 1995, Norwest had been appointed trustee under a pooling and servicing agreement with Equicon and LSI Financial Group. The trust held vari-

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[1] One of the documents signed on January 22, 1996, is a "Notice of Assignment, Sale or Transfer of Servicing Rights," notifying plaintiffs that the "servicer" under the loan would be LSI Financial Group, through Norwest, as Trustee. This notice does not refer in any way to funding or sale of the loan.

ous assets, principally mortgages, and plaintiffs' mortgage was one of the mortgages deposited to the trust. As trustee, Norwest had no beneficial ownership interest in the mortgages in the trust. Norwest did not provide any of the funds Custom loaned to the Chandlers. Norwest did not receive any of the fees the Chandlers paid to Custom.

The parties dispute whether the fees totaling 5% charged by Custom were reasonable. Custom has provided evidence that this fee is considered reasonable in the industry and in fact is reasonable, particularly in view of plaintiff's history of bankruptcy and in view of the interest rate charged for the loan. The plaintiffs had filed Chapter 7 bankruptcy proceedings in December of 1994 and had received a discharge in bankruptcy on April 6, 1996. Plaintiffs have provided evidence that any fee above 2% is unreasonable.

IV. Discussion

The uncontroverted evidence establishes that the $57,156.25 in funds provided to plaintiffs on January 26, 1996, were derived exclusively from a line of credit between Custom and Corestate Bank; Custom repaid Corestate on January 31, 1996. Although plaintiffs argue that "Custom was not the real source of funding for this loan" and that "Custom and Norwest devised an elaborate shell game of electronic transfers," they do not present any evidence supporting this contention. As plaintiffs concede, Custom closed the loan in its own name, with funds deposited in Custom's account by Corestate on January 26, 1996. Custom was liable to Corestate for this amount, and the undisputed evidence

shows that Custom was the "real source of funding" for the loan.

Under the undisputed facts presented here, the later mortgage assignment from Custom to Norwest constitutes a secondary market transaction, and is exempt from RESPA. *See* 24 C.F.R. § 3500.5(b)(7); *see also* 24 C.F.R. Appendix B (1995). Moreover, plaintiffs failed to provide the Court with any evidence that the transaction between Custom and Norwest was not a bona fide transfer of rights. *See* 24 C.F.R. § 3500.5(b)(7). Although plaintiffs argue the "universal unreasonableness of any 'discount fee' above two points," and speculate that there was an "understanding between Custom and Norwest in which Custom was allowed to charge unreasonable and unearned fees in connection with refinancing as long as Custom referred the loan to the Norwest Trust," they have failed to set forth any evidence showing that Custom gave or accepted kickbacks or unearned fees. Plaintiffs have failed to provide any evidence that any of the allegedly excessive fees received by Custom were given to Norwest. The dispute over the reasonableness of Custom's fees is not material to the issues raised by the complaint. As no genuine issues of material fact remain, the Court will grant summary judgment in favor of defendants.

V. The Cross-Motions for Sanctions

Norwest filed a Rule 11 motion for sanctions against plaintiffs and their counsel, contending that they failed to perform reasonable inquiry into whether the factual contentions of the complaint as to Norwest had any evidentiary support. Plaintiffs did not respond to that

motion within the time set by local rule, but instead later filed a "cross-motion" for sanctions, arguing that Norwest's motion for sanctions was in itself sanctionable. This type of dueling Rule 11 motion was intended to be discouraged by the 1993 addition of the safe-harbor provisions of Rule 11, although those provisions obviously were not effective here.

The Court agrees that plaintiffs violated Rule 11 in filing this complaint against Norwest. Although plaintiffs' *may* have arguably had a reasonable belief that their claim against Custom had or was likely to have evidentiary support, they could not have made any reasonable inquiry as to Norwest, given Norwest's uninvolvement in the actual transaction between Custom and the Chandlers. Apparently the only basis for plaintiffs' joining Norwest in this action was the existence of the notice that LSI would be the servicer of the loan, but that document contains nothing that would lead reasonable counsel to believe the allegations of this complaint were likely to have evidentiary support. Had plaintiffs had a reasonable belief, formed after reasonable inquiry, that their allegations had evidentiary support, they could have produced some evidence in response to the pending motions; instead plaintiffs produced absolutely no evidence of their allegations against Norwest, and Rule 11 sanctions are therefore appropriate. Under the circumstances of this case, the Court finds that requiring plaintiffs' counsel to pay Norwest's reasonable attorneys' fees and other expenses of defending this action is an appropriate sanction and is warranted for effective deterrence of similar conduct in the future. Accordingly,

IT IS HEREBY ORDERED that defendant Custom Mortgage, Inc.'s motion for summary judgment [#29] is granted.

IT IS FURTHER ORDERED that defendant Norwest Bank Minnesota's motion for summary judgment [#30] is granted.

IT IS FURTHER ORDERED that Norwest Bank Minnesota's motion for sanctions [#35] is granted, and plaintiffs' counsel shall pay to defendant Norwest Bank Minnesota, N.A., its reasonable attorneys' fees and expenses of this action, as a Rule 11 sanction and to deter counsel from similar violations in the future.

IT IS FURTHER ORDERED that plaintiffs' motion for sanctions [#40] is denied.

IT IS FURTHER ORDERED that all other remaining motions are denied as moot.

A separate judgment in accordance with this Memorandum and Order is entered this same date.

/s/ Catherine D. Perry
CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 24th day of March, 1997.

[Filed April 19, 1996]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

LARRY CHANDLER and JOANNE CHANDLER, of Jefferson County, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	No. 4:96 CV 00761 CDP
v.	)	Jury Demanded
NORWEST BANK MINNESOTA, NATIONAL ASSOCIATION, and CUSTOM MORTGAGE, INC.	)	
Defendants.	)	

COMPLAINT - CLASS ACTION

MATTERS COMMON TO MULTIPLE COUNTS

INTRODUCTION

1. Plaintiffs, Larry D. Chandler and Joanne R. Chandler ("Mr. and Mrs. Chandler"), bring this class action against defendants Custom Mortgage, Inc. ("Custom"), and Norwest Bank Minnesota, National Association ("Norwest") to secure redress for a practice of imposing charges for settlement services in mortgage transactions that were not reasonable compensation for services actually performed, in violation of the Real Estate Settlement Procedures Act, 12 U.S.C. §2601 *et seq.* ("RESPA") and state law.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action under 12 U.S.C. §2607 and 28 U.S.C. §§1331 and 1367.

3. Venue in this District is proper, in that the claim arose here.

PARTIES

4. Mr. and Mrs. Chandler reside in a home which they own, located at 1108 Ellen Drive, Imperial, Missouri 63052.

5. Custom is an Indiana corporation with its principal place of business at 1408 Pennsylvania Street, Indianapolis, Indiana, 46202. Its registered agent is Frank Rowe, Jr., 950 North Meridian Street, Suite 550, Indianapolis, Indiana, 46204.

6. Custom is a corporation which is engaged in the business of consumer lending and regularly extends credit to consumers in exchange for finance charges. On information and belief, during each of the last several years, Custom engaged in more than 25 consumer credit transactions. On information and belief, Custom originates more than $1 million of mortgages each year.

7. Norwest is a nationally chartered commercial bank, and a subsidiary of Norwest Corporation. Its principal place of business is Norwest Center, 6th and Marquette, Minneapolis, Minnesota.

8. Norwest is engaged in the business of consumer lending and regularly extends credit to consumers in exchange for finance charges. Upon information and belief

during each of the last several years, Norwest engaged in more than 25 consumer credit transactions. Upon information and belief, Norwest also purchases mortgages originated and to be originated by others. Upon information and belief, Norwest originates more than $1 million of mortgages each year.

PLAINTIFFS' TRANSACTION

9. On January 22, 1996, Mr. and Mrs. Chandler entered into a mortgage loan transaction with Custom for personal purposes, namely, to refinance their home. Their note and mortgage are attached as *Exhibit A*.

10. The loan was "table funded" by Custom for Norwest. "Table funding" occurs when a company which is essentially a mortgage broker disburses funds which belong to a third-party lender. The loan may be closed in the broker's name, with an immediate assignment to the lender. "The Rise of Mortgage Brokers; They're Gaining Popularity, But Clients Should Remain Wary," *Pennsylvania Law Weekly*, July 4, 1994, p. 12. Table funded loans do not represent secondary market transactions. 12 C.F.R. §3500.2; "Table Funding Rebuffed Again," *National Mortgage News*, Feb. 21, 1994, p. 6; "HUD May Grant Home Equity Reprieve," *Mortgage Commentary Publications*, Dec. 13, 1993, p. 4.

11. In connection with their mortgage loan transaction, Mr. and Mrs. Chandler received a HUD-1 Settlement Statement. The HUD-1 Settlement Statement ("HUD-1") is attached as *Exhibit B*.

12. Custom had sold the Chandler's loan to Norwest prior to the closing. The assignment is attached as *Exhibit C*.

POLICIES AND PRACTICES COMPLAINED OF

13. The mortgage loan transactions of plaintiffs and the members of the classes described below were transactions subject to 12 U.S.C. §2601 *et seq.*, known as the Real Estate Settlement Procedures Act ("RESPA").

14. Plaintiffs and the members of the classes described below are entitled to have federally-related mortgage transactions closed without incurring charges that are duplicative or for which no or only nominal services are performed, or that merely represent payment for the referral of business.

15. It is the policy and practice of Norwest to impose and cause to be paid and of Custom to receive, charges that are merely for referral of business or are duplicative or are for services that are not actually performed or are only nominally performed in connection with the settlement of real estate transactions. Specifically, these include loan discount fees or other fees exceeding 2% of the principal amount of the loan.

16. As a result of this policy and practice of Custom and Norwest, the costs of plaintiffs' and the class members' home loans were significantly increased because the plaintiffs and class members essentially had to pay for the hidden fees in the form of higher interest rates, higher closing costs or higher finance charges, and higher monthly mortgage payments.

17. As a result of the policy and practice of Custom and Norwest, plaintiffs and the members of the classes were charged duplicative charges and charges for which no or only nominal services were performed in connec-

tion with the settlement of real estate transactions, in violation of 12 U.S.C. §2607 and 24 C.F.R. §3500.14(c).

CLASS ACTION ALLEGATIONS

18. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, plaintiffs bring this claim on behalf of two classes, designated Class A and Class B, respectively.

19. Class A consists of all persons who satisfy the following criteria:

a. They entered into a residential mortgage transaction that was documented as a consumer credit transaction, in that Truth in Lending disclosures were provided.

b. The loan file indicates that the loan was made for personal, family or household purposes.

c. The loan was originated in the name of a company other than Norwest and assigned to Norwest before the second payment.

d. The loan file contains a document showing that payments were made by Norwest and/or the borrower(s) to a broker or originator exceeding in combination 2% of the loan principal.

20. Class B consists of all persons who satisfy the following criteria:

a. They entered into a residential mortgage transaction that was documented as a consumer credit transaction, in that Truth in Lending disclosures were provided.

b. The loan file indicates that the loan was made for personal, family or household purposes.

c. The loan was originated in the name of Custom.

d. The loan file contains a document showing that payments were received by Custom exceeding in combination 2% of the loan principal.

21. The class period begins one year prior to the filing of this complaint.

22. The class members are so numerous that joinder of all members is impractical.

23. There are questions of law and fact common to the classes, which questions predominate over any questions affecting only individual members. The principal issues raised by this claim are:

a. Whether paying or arranging for the payment of compensation in excess of 2% of the loan principal to a mortgage broker or originator represents payment that is in an amount above the reasonable value of settlement services actually performed or is merely for the referral of business; and

b. Whether such payment violates 12 U.S.C. §2607 and 24 C.F.R. §3400.14(c).

24. The only individual questions concern the identification of the persons who paid the improper charges. This can be determined by ministerial examination of papers.

25. Plaintiffs' claims are typical of those of the class members. All are entitled to relief on the basis of the same fact pattern and legal theory.

26. Plaintiffs will fairly and adequately protect the interests of the classes. They have retained counsel ex-

perienced in handling class actions and actions involving unlawful business practices. Neither plaintiffs nor plaintiffs' counsel have any interests which might cause them not to vigorously pursue this action.

27. Certification of a class under Rule 23(b)(3) is appropriate, as a class action is superior to other available methods for the fair and efficient adjudication of this controversy. The interest of the class members in individually controlling the prosecution and defense of separate actions is minimal, as the class members are unlikely to be aware that their rights were violated and in that individual actions are uneconomical. Difficulties likely to be encountered in managing this class action are substantially less than are involved in other types of cases routinely certified as class actions, *e.g.*, for securities fraud.

WHEREFORE, plaintiffs request that the Court enter judgment in favor of plaintiffs and the members of the classes and against defendants as follows:

a. For damages in an amount equal to three times the improper payment, pursuant to 12 U.S.C. §2607(d)(2).

b. For attorneys fees, litigation expenses and costs.

c. For such other or further relief as the Court deems appropriate.

COUNT I – RESPA

28. Plaintiffs incorporate ¶¶1-27.

29. This count is brought on behalf of Classes A and B.

30. It is a violation of RESPA, 12 U.S.C. §2607, and HUD Regulation X, 24 C.F.R. §3500.14(c), to impose or receive for settlement services in a federally-related mortgage transaction charges that are duplicative or do not correspond to services actually performed or are for merely nominal services.

31. Defendants violated 12 U.S.C. §2607 and 24 C.F.R. §3500.14(c) by causing a $3,018.75 loan discount fee to be charged by and paid to Custom. This fee was 5% of plaintiffs' mortgage, and represents an amount in excess of the reasonable compensation for originating a loan.

32. Reasonable compensation for a mortgage broker is about 1% of the principal of the loan. If the loan originated in the name of the broker, reasonable compensation does not exceed 2% of the principal of the loan. Mary Sit, "Mortgage brokers can help borrowers," *Boston Globe*, October 3, 1993, p. A13; Jeremiah S. Buckley and Joseph M. Kolar, "What RESPA has wrought," *Savings & Community Banker*, Feb. 1993, vol. 2, no. 2, p. 32.

COUNT II - CONSUMER FRAUD

33. Plaintiff incorporates ¶¶1-32.

34. This count is brought on behalf of Class A only.

35. Norwest violated Minnesota Stat. Ann. §§8.31, 325D.42, *et seq.* by engaging in the deceptive practice of imposing duplicative charges or excessive charges for nominal services in connection with a mortgage transaction.

36. By such conduct, Norwest may also have violated some or all of the following statutes prohibiting unfair or deceptive business practices:

Alabama Code §8-19-1
Alaska Statutes § 45.50.471
Arizona Rev. Stat. Ann. §44-1521
Arkansas Stat. Ann §4-88-101
California Business & Professions Code §§17200, 17500, Civil Code §1750
Colorado Rev. Stats. §6-1-101
Connecticut Gen. Stat. Ann. §42-110a
Delaware Code Ann. title 6 §§2531, 2511
D.C. Code Ann. §28-3901
Florida Stat. Ann. §501.201
Georgia Code Ann. §§10-1-370, 390
Hawaii Rev. Stats. §§480, 481A
Idaho Code §48-601
815 Illinois Compiled Statutes 505/1 et seq., 510/1 *et seq*.
Indiana Code Ann. §24-5-0.5-1
Iowa Code Ann. §714.16
Kansas Stat. Ann. §50-623
Kentucky Rev. Stat. §367.110
Louisiana Rev. Stat. §51:1401
Maine Rev.Stat. Ann. title 5, §206
Maryland Commercial Law Code Ann. §13-101
Massachusetts General Laws ch. 93A
Michigan Compiled Laws Ann. §445.901
Mississippi Code Ann. §75-24-1
Missouri Rev. Stats. §407.010
Montana Code Ann. §30-14-101
Nebraska Rev. Stat. §§59-1601, 87-302
Nevada Rev. Stat. §§41.600, 598.360
New Hampshire Stat. Ann. §358-A:1
New Jersey Stat. Ann. §56:8-1

New Mexico Stat. Ann. §57-12-1
New York General Business Law §§349-50
North Carolina Gen. Stat. §75-1.1
North Dakota General Stat. §51-15-01
Ohio Rev. Code Ann. §§1345.01, 4165
Oklahoma Stat. Ann., title 15, §751, title 78, §51
Oregon Rev. Stats. §646.605
Pennsylvania Stat. Ann., title 73, §201-1
Rhode Island General Laws §6-13.1-1
South Carolina Code Ann. §39-5-10
South Dakota Cod. Laws Ann. §37-24-1
Tennessee Code Ann. §47-18-101
Texas Business and Commercial Code Ann. §17.41
Utah Code Ann. §§13-2-1, 13-5-1, 13-11-1
Vermont Stats. Ann. title 9, §2451
Virginia Code §59.1-196
Washington Rev. Code Ann. §19.86.010
West Virginia Code, §46A-6-101
Wisconsin Stat. Ann. §100.18, 100.20
Wyoming Stat., §40-12-101

37. Plaintiff contends that the Minnesota statute applies to all of Class A because Norwest is headquartered in Minnesota and the policies and practices complained of were directed from Minnesota.

38. Plaintiff and each class member were damaged as a result.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class members and against Norwest as follows:

a. For appropriate damages.

b. For attorney's fees, litigation expenses and costs.

c. For such other or further relief as the Court deems appropriate.

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JURY DEMAND

Plaintiffs demand trial by jury.

/s/_____
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